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YEOH KEN LEE, KELVIN

v.

LIEW CHOOI HOONG

*b*HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[ORIGINATING SUMMONS NO: S8-24-127-2004]
5 OCTOBER 2004*c*

FAMILY LAW: *Children - Custody - Maintenance - Considerations - Material change in circumstances - Welfare of children - Law Reform (Marriage & Divorce) Act 1976, s. 96*

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CIVIL PROCEDURE: *Consent order - Variation - Principles applicable - Whether parties estopped from varying such order - Law Reform (Marriage & Divorce) Act 1976, ss. 83, 96*

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This was an application by the plaintiff/father to vary an order of court dated 15 March 2004 ('the order') in order for custody of the minor children be granted to him instead of the defendant/mother, with appropriate access arrangements for the defendant. The order was a consent order, whereby the parties had agreed that custody, care and control of the said children be granted to the defendant with certain access arrangements for the plaintiff. The defendant had failed to comply with part of the order and the plaintiff had served the defendant with a penal notice. The plaintiff submitted evidence of neglect and abuse by the defendant in his affidavits, contending that he feared for the safety and well-being of his children; he also averred that he was better equipped to look after his children compared to the defendant.

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Held (allowing the application):

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[1] There was no question of either party being estopped from varying an order made by consent, if the application to vary was made under either ss. 83 or 96 of the Law Reform (Marriage & Divorce) Act 1976, as the law gives the court the power to vary such orders in the circumstances set out in those sections, and the power is not limited to non-consensual orders. (p 411 a)

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[2] In light of the documentary evidence in the instant case, there had been a material change in the circumstances as outlined in the plaintiff's affidavits, they being that: (i) the plaintiff now resided with his parents in Shah Alam; (ii) the children had been neglected by the defendant; (iii) the defendant had failed to comply with the order; and (iv) the children's

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situation was now worse than before the order in terms of their welfare under the care of the defendant. Even the wishes of the parents were subordinate to the principle that the paramount consideration should be the welfare of the children, and on the facts of the present case, it was in the best interests of the children that the application be allowed. (p 416 a-c)

Case(s) referred to:

(B (GC) v. B (BA) [1970] 1 WLR 664 (refd)

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC (refd)

Ganapathy Chettiar v. Lum Kum Chum & Ors [1981] 2 MLJ 145 (refd)

Lina Soo v. Ngu Chu Chiong [1992] 2 MLJ 870 (refd)

Lina Soo v. Ngu Chu Chiong & Anor [1999] 5 MLJ 396 (foll)

Thwaite v. Thwaite [1981] 2 All ER 7689 (refd)

W v. H [1987] 2 MLJ 235 (refd)

Yap Teck Ngian v. Han Tong Kwang & Lain-Lain [2003] 5 MLJ 178 (dist)

Legislation referred to:

Law Reform (Marriage & Divorce) Act 1976, ss. 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 96, 97

Rules of the High Court 1980, O. 45 r. 7(4)

Other source(s) referred to:

Halsbury's Laws of England, 4th edn, vol 13, paras. 1168-1170

Rayden on Divorce, 14th edn, p 847, para 144

For the plaintiff - Balwant Singh Sidhu; M/s Balwant Singh Sidhu & Co

For the defendant - Albert Koo Tee Yih; M/s Chin & Rakan-rakan

Reported by Suresh Nathan

JUDGMENT**Faiza Tamby Chik J:**

Section 83 of the Law Reform (Marriage & Divorce) Act 1976 (Act 164) gives the Court power to vary orders for maintenance. As this section comes under the 'maintenance of spouse' (ie, ss. 77 to 86) it obviously refers to spousal maintenance orders. Section 96 of Act 164 gives the court power to vary orders for custody and maintenance. As this comes under Part VIII of the Act (Protection of Children) it obviously refers to maintenance orders for children (as well as custody orders for children). It should be noted that there is no such provision in respect of orders for division of matrimonial assets, as such orders are final. Therefore, in respect of custody and maintenance orders, it does not matter whether the order is an 'interim order' or a 'final' order or a consent order, as the power to vary such orders (for custody and/or maintenance) is expressly given to the court.

- a* In *Ganapathy Chettiar v. Lum Kum Chum & Ors.* [1981] 2 MLJ 145 the Federal Court, at p. 146 E (left hand) stated that ‘an order by consent is evidence of the contract between the parties and is binding on all the parties to the order. It may be pleaded as an estoppel (*Kinch v. Walcott*). Now that the case involved a dispute between registered co-proprietors of land. It is an example of how parties are generally bound by consent orders that they have entered into. The position in Family Law is different. Family Law provides for the variation of orders for custody and/or maintenance (ss. 83 and 96 of the Act, referred to earlier). Once the power to vary such order is given to the court, it matters not that the order sought to be varied was a Consent Order. The learned authors of *Rayden on Divorce* (14th edn) at p. 847 (para. 144) had no hesitation in stating (after setting out the court’s powers to vary certain orders) that ‘the same basic approach applies to variation of consent orders ...’, and went on to state the power to vary reflects changes in circumstances subsequent to the date of the order. *Halsbury’s Laws of England* (4th edn) in vol. 13, paras 1168-1170 also deals with variation of orders. After setting out (in para. 1268) what orders may be varied, and (in para. 1169) the procedure the learned authors deal (in para. 1170) with the principles on which the court acts in consent orders. At p. 550, the learned authors state, ‘a consent order may be varied if there is material change in the position of one of the parties ... etc.’. Although that paragraph deals with financial orders by consent, the same principles apply to custody orders for which the court has also been given to vary. Indeed, the power to vary is even more crucial in matters relating to children, as orders for custody and access are never final, and the primary consideration is always the welfare of the child. Even the parties cannot oust the jurisdiction of the court in such matters. In *Thwaite v. Thwaite* [1981] 2 All ER 7689, Ormrod LJ stated that (in relation to consent orders):

- g* ... if their legal effect is derived from the Court Order and dealt with, so far as possible in the same way as non-consensual orders. So, if the order is one of those listed in Section 31(2) of the Act of 1973, it can be varied in accordance with the terms of that Section: see *B(G.C.) v. B.(B.A.)* [1970] 1 WLR 664.

In that case, (*B(G.C.) v. B.(B.A.)*) the court stated, at p. 916, that:

- h* The case referred to in the Supreme Court Practice 1970 are all cases arising out of judgments or orders made by consent by parties litigating in other Divisions in which the Court makes final judgments. The reasoning in these cases must be applied with great caution to cases such as the present, where no final judgment is or can be made; and the Court retains its powers to adjust the orders in the light of all the circumstances of the case.

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There is no question of either party being estopped from varying an order made by consent, if the application to vary is made under either s. 83 or 96 of the Act (ie, to vary orders for custody or maintenance), as the law gives the court power to vary such orders in the circumstances set out in those sections. The power is not limited to non-consensual orders. Indeed, if consent orders may not be varied even if these are for custody or maintenance, then the primary principle of the welfare of the children would have to be disregarded in favour of a perceived notion that parties are bound by consent orders, no matter what the consequences – even when there is a material change in circumstances. That cannot be the law. In the ordinary case, there has to be finality. That is so even in orders for division of matrimonial assets, where there is no provision for applications to vary. There is, however, a provision to vary orders for custody and/or maintenance and that power ought to be exercised where ss. 83 and/or 96 apply, so as to preserve the *parens patriae* position of the court in relation to all children within the jurisdiction. I, therefore conclude that as custody and maintenance orders may be varied, under our legislation, it does not therefore matter whether the order sought to be varied was a consent order or not. The first objection that has been raised in that the indorsement of the penal notice on the order is only addressed to the defendant, and not to the plaintiff. It is claimed that the indorsement was never agreed upon. I think the argument is misconceived. These proceedings are not committal proceedings, to commit the defendant to prison for contempt of the said order (although she has breached the said order by not allowing the plaintiff to pick up the younger child, Sean Yeoh on weekdays, although the said order of the court clearly gives access to both children on schooldays, and in fact specifically states that he is to return the children in the evenings). This clearly means that he is at liberty to take both of them out in the mornings, and any argument that the order is not clear is mischievous. There is therefore absolutely no basis for the defendant's refusal to comply with that part of the order, and allowing the plaintiff to only pick up the elder child, Keith in the mornings on schooldays. The indorsement of the penal notice on the order is perfectly in order, as O. 45 r. 7(4) of the Rules of the High Court (RHC) 1980 requires that there must be indorsed on the copy of an order served under that rule (ie, as a prerequisite to enforcement), a Notice in Form 87 informing the person that if he disobeys the order, he is liable to process of execution to compel him to obey it. It is observed that the plaintiff had accordingly indorsed that notice (as per Form 87) on the copy of the order before it is served on the defendant. I think the plaintiff hereby had complied with all prerequisites and is in fact entitled to commence committal proceedings against the defendant for contempt of the order. Obviously if the plaintiff is

- a* in breach of the order, the defendant would similarly have to serve a copy of the order, with a similar penal notice (Form 87) indorsed, but addressed to the plaintiff. This is trite law. There is therefore absolutely no excuse for the defendant's failure to comply with the said order. The addition of the penal notice, in the circumstances does not in any way affect this application.
- b* The summons in chambers dated 20 April 2004 (encl. 17) is an application by the plaintiff-father to vary the order of court dated 15 March 2004, so that custody of the minor children Keith Yeoh and Sean Yeoh is granted to him instead of the defendant-mother (with appropriate access arrangements for the defendant). The order of 15 March 2004 was a consent order, whereby the
- c* parties had agreed that custody, care and control of the said children be granted to the defendant with access to the plaintiff every weekend (except for one weekend each month) from 8pm Friday to 8pm Sunday; on weekdays the plaintiff was permitted to collect both children from the residence of the defendant in the morning, send Keith and Sean to school, and send both the
- d* children back to the defendant's residence in the evenings; 1/2 the school holidays; and reasonable access on the birthdays of the children for Chinese New Year and Christmas. The plaintiff contends that he had agreed to the earlier consent order of 15 March 2004 after negotiations with the defendant with the assistance of both solicitors (para. 5 encl. (16)). He says he had
- e* reservation even then, but was persuaded by the daily access arrangements agreed upon, and decided to give the defendant a chance to prove that she is capable of looking after the said children (para. 6 of encl. (16)). He says he had, in his earlier affidavits (encls. 2, 9 and 12) set out the evidence of neglect of the children by the defendant, including photographs (para. 7 of encl. (16)).
- f* He says that things have now got worse (paragraph of encl. (16)). He refers to an incident at the school when there was an altercation between his mother and the defendant (paras. 12 to 15 of encl. (16)) during which even the child Keith suffered a scratch, and the other son Sean was put at risk by the defendant. He says he is only allowed to pick up Keith at 10.30am and he has not been allowed to pick up his son Sean (paras. 17 to 23 of encl. (16))
- g* and that the defendant is in contempt of the said order (para. 24 of encl. (16)). He says the neglect of the children at the hands of defendant continues (para. 25 of encl. (16)). He annexes various photographs (para. 26 of encl. (16)) which show mosquito bites, rashes, and even bruises on the son Keith. He also annexes a medical report (para. 27 of encl. (16)) (which advised more frequent diaper change, to prevent napkin dermatitis). He says he fears for the
- h* safety and well-being of his children in view of the apparent neglect and abuse at the hands of the defendant; that he is able to look to their every need himself; that he works in the family business and has the time to tend to his children (para. 28 of encl. (16)) while the defendant works full-time (para. 29
- i* of encl. (16)).

The affidavit-in-reply of the defendant of 5 May 2004 states that the defendant does not address the issue of her non-compliance with the Order of Court of 15 March 2004, save to say that the time for the plaintiff to collect the children was not defined (para. 9). She also does not give credible answers to the question of neglect. The plaintiff's affidavit-in-reply of 14 June 2004 states that the order of 15 March 2004 was duly served on the defendant, with a penal notice endorsed thereon. He says that while the time for collecting the children was not specified, the defendant is in contempt of the order in not allowing him to collect the younger child, Sean at all on weekdays (paras. 8, 9 and 10). He gives further evidence of neglect of the children by the defendant (para. 12). He says his time is flexible (para. 16). He gives further evidence of the incident at the school (para. 22). He says Keith is in the afternoon sessions (school) as the morning sessions were full (paras. 14 and 25). He now lives with his parents (para. 26). He says he has complied with the order (paras. 28 and 29). The defendant's affidavit of 2 July 2004 (encl. 19) states that the defendant does not give credible answers for her non-compliance with the order of court, or the apparent neglect of the children while under her care. The affidavit-in-reply of the plaintiff of 6 September 2004 (encl. 22) states that he now resides with his parents in Shah Alam (para. 5). He repeats that he has not been allowed to collect his younger son, Sean on weekdays despite the order of 15 March 2004 (para. 8). He refutes the various statements of the defendant in great detail. Of primary importance is that the children are very comfortable at his parents' home in Shah Alam (para. 22). He says the boys are lacking extra-curricular activities, and he is deprived of an opportunity to do his part in their development by being denied proper day access on weekdays (para. 24). The plaintiff had said in his evidence that he had agreed to the earlier consent order to give the defendant a chance to prove that she is capable of looking after the children. He says that things in fact got worse, after the consent order was recorded. He says the defendant has failed to comply with the said consent order. He refers to the abuse and neglect of the children at the hands of the defendant, which has got worse. He resides with his parents in Shah Alam, and says that the children are reluctant to be with the defendant. The defendant's reliance on *Yap Teck Ngian v. Han Tong Kwang dan Lain-Lain* [2003] 5 MLJ 178 is an example. In that case, the consent order was in the course of administration proceedings. There is no provision in the law relating to administration for the variation of such orders, whether the order was by consent or otherwise. The circumstances in which 'an order or consent judgment' (as stated in that case) may be set aside in the ordinary case is clear – but here we are dealing with specific provisions of Family Law which allows variation of orders (whether the orders are consent orders or not) when there is a material change in circumstances. If we refer to p. 11 of the defendant's bundle, there is a reference to a judgment of Peh

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- a* Swee Chin FCJ in *Badiaddin bin Mohd. Mahidin & Anor v. Arab Malaysian Finance Bhd.* [1998] 2 CLJ 75, which says that, ‘the grounds referred to for setting aside a consent order ... are grounds which basically relate to *consensus ad idem* or the free consent of parties to a binding agreement or contract ... it is elementary that if it is proved that there are grounds which vitiate such
- b* free consent, the agreement is not binding ...’. That authority would apply if the plaintiff’s application was based on the premise that he did not validly consent to the order of 15 March 2004. But that is not the case here. The plaintiff is not saying he did not freely consent. He is saying that subsequent to the order, there are grounds (as provided in s. 96 of the Law Reform
- c* (Marriage & Divorce) Act 1976) to vary the said order. He says there is a material change in circumstances ie, that:
- (i) things have got worse, in terms of the defendant’s neglect of and apparent abuse of the children;
- d* (ii) the plaintiff now resides with his parents in Shah Alam, and is in an even better position to attend to the needs of his children; and
- (iii) the children are reluctant to live with the defendant and show a marked preference to be with him.
- e* Section 96 does not say that it does not apply to consent orders. Indeed, that cannot be the law for it would create an anomaly – if orders of court given at the discretion of the judge could be varied if there is a material change of circumstances, and if order by consent could not be varied even if there was a material change in circumstances. To use an extreme example, if one party
- f* to a marriage consents to custody being given to the other party on certain terms, and that party then dies, is the order granting custody to the deceased spouse to remain, just because it was an order by consent? Can it not be varied by that very material change of circumstances, ie, the death of the party given custody? That even if there is no death, but the party given custody is physically or mentally incapacitated from being able to look after the child,
- g* can the consent order never be varied? Is a paraplegic to continue to have custody just because he or she secured it with the consent of the other party before he or she became a paraplegic? Is that not a material change of circumstances which would warrant a variation of the order, whether the 1st Order was by consent or not? For the removal of doubts, I need only refer to
- h* ss. 96 and 97 of the Act which give the court power to vary orders and agreements for maintenance. Such an order or agreement may be varied if there is a material change in circumstances.
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Why are the parties allowed to do so? Because in the nature of things, an order for maintenance can never be a final order, for the means and needs of the parties and the needs of the child are bound to change over time. Similarly, the interests of the welfare of the child may change over time, necessitating a change in custody and/or access arrangements. The paramount consideration being the welfare of the child, such orders can never be final, in the strict sense, unlike orders in other branches of the law. There is no authority that I have come across in the Commonwealth that says that a custody order (by consent) cannot be varied – for that would mean that the court would be abdicating its responsibility and duty towards the child. It is for the protection of the child that Part VIII of the Act (ss. 87 to 103 – entitled ‘*Protection of Children*’) was enacted. Indeed, in the case of *W. v. H.* [1987] 2 MLJ 235, Dato’ M. Shankar J (as he then was) said at p. 69 G, (right hand) that ‘parents cannot oust the protective jurisdiction of the court over their children in matters of custody and maintenance’ and at p. 72 D (right hand) that ‘no infant’s rights can be compromised by any document drawn by adults without the approval of the court ...’. Indeed, when the court gives it sanction to an agreement by granting a consent order (as also in the case of joint petitions) the authority thereafter is derived not from the consent of the parties but from the order of court. Counsel for the defendant also refers to the case of *Lina Soo v. Ngu Chu Chiong (Chong Oi Khim, Irene Co-Respondent)* [1992] 2 MLJ 870. That case in fact supports the plaintiff’s case that in family law even though a consent order is technically a final order, it may be varied (as in the case of orders for custody and maintenance) if there is a material change in circumstances. It must be observed that the court had clearly differentiated between applications to vary a consent order for maintenance and an order for division of assets. The former may be varied if there is a material change in circumstances; the latter may not – simply because there is no provision to vary orders for division of property, and the question of change of circumstances (in the case of property orders) does not even arise. (See *Lina Soo v. Ngu Chu Chiong & Anor* [1999] 5 MLJ 396, where the court heard and allowed an application to vary the earlier consent order of 14 June 1989 on the ground that there was a material change in circumstances.)

Section 96 of Act 164 states:

The Court may at any time, and from time to time vary, or may rescind, any order for the custody or maintenance of a child on the application of any interested person, where it is satisfied that the order was based on any misrepresentation, or mistake of fact, or where there has been any material change in the circumstances.

- a* The same principle applies to the variation of consent orders. I think in the light of the documentary evidence, there has been a material change in the circumstances as outlined in the affidavits. The plaintiff now resides with his parents in Shah Alam, the children have been neglected by the defendant; the defendant has failed to comply with the consent order of 15 March 2004, and
- b* the children's situation is now worse than before the said order, in terms of their welfare under the care of the defendant. I think it is in the best interests of the children that this application should be allowed. The defendant works normal working hours. The plaintiff works for his family's business and has flexible working hours. This advantage should benefit the children. After all
- c* even the wishes of the parents are subordinate to the principle that the paramount consideration shall be the welfare of the child. He proposes to attend to all their needs the whole day, including sending them to school, nursery etc. and collecting them therefrom. The plaintiff had consented to the earlier order to give the defendant a chance to prove that she is capable of
- d* looking after the children (para. 6 of his affidavit of 20 April 2004 – encl. (16)). Things got worse after the said order (paras. 7 and 25 of the said affidavit). The defendant had attacked the plaintiff's mother with callous disregard for the safety of the child (paras. 15, 22 and 24 of the said affidavit). The plaintiff now resides with his parents in Shah Alam and is in an even better position to look after the children (para. 4 of his affidavit of 14 March 2004 – encl. (18)). The children are reluctant to stay with the defendant (para. 11 of encl. (18)) and the defendant has abused the children (para. 12 of encl. (18)).

- e* For these reasons the court hereby grants order in terms of prayer (1) and (2)
- f* and for prayer (3) each party bears its own costs.

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